

Comments on MTC Model Use Tax Reporting Statute

1. Subsection (a) **Administration** requires: “*The [State Department of Revenue] shall perform all functions necessary and proper for the administration and enforcement of this Section.*”
 - a. Auditing is concerned that this provision does not leave room for audit discretion where it is determined that certain audit efforts will not produce sufficient revenue to justify the allocation of state resources.
2. Subsection (c)(1) **Notice to Purchaser at the Time of Transaction** requires non-collecting sellers and marketplace facilitators to provide a notice to each purchaser at the time of the sale stating that sales tax was not collected and use tax must be paid directly to the state taxing agency.
 - a. The primary challenge is jurisdictional. How will a state’s audit agency force non-collecting sellers, who by definition do not have nexus with the audit state, to allow auditors to inspect their books and records to verify whether these notices were provided?
 - b. Secondly, even if the audit agency is allowed access to a non-collecting seller’s books and records, it will require digital forensics outside of the expertise of most audit agencies to verify whether these notices were actually provided to each purchaser at the time of sale.
 - c. Thirdly, assuming that the above obstacles were overcome, a second jurisdictional challenge arises with enforcement of any penalties that are assessed. For in-state sellers a taxing agency has tools such as real property liens and revocation of sales licenses. However, these tools are not available against non-nexus sellers who by definition do not have sales licenses or tangible assets in the enforcing state.
3. Subsection (c)(3)(A) requires a non-collecting seller or marketplace facilitator to file an annual report with each state’s taxing agency to report those untaxed sales that were shipped into the state.
 - a. This provision has the same jurisdictional enforcement challenges as previously mentioned but also presents the further challenge of what a taxing agency should do with the information it receives. Assuming that non-collecting sellers and marketplace facilitators cooperate, a taxing agency will receive a report including the following information:
 - i. Name of the purchaser;
 - ii. Billing Address;
 - iii. Mailing Address;
 - iv. Shipping Address in the State;
 - v. Total value of purchases shipped to each address in the State.

A taxing agency would then have to use this report to assess use tax against the person residing at each shipping address when that person may not have been the purchaser who initiated the sale. This creates a potential due process problem because a tax could be assessed against a person who took on action to incur the tax merely because something was sent to his address.

4. Subsection (i) **Sourcing Sales of Digital Goods and Software**. This provision contains the following language:

*“For purposes of filing the reports required in this section, the seller or marketplace facilitator may consistently use any commercially reasonable method of sourcing sales. [Drafter’s Comment – The choice not to suggest the use of the state’s specific sourcing method for these sales is conscious. **Non-collecting sellers would not generally be subject to the state’s tax collection jurisdiction.** This rule is intended to be flexible and allow a single business to apply a single sourcing rule across all states.]”*

- a. This provision reveals an internal inconsistency within the model statute. It acknowledges that a state does not have jurisdiction to impose its sourcing laws on a non-collecting seller but as previously discussed the jurisdictional enforcement difficulties of assessment and collection are not addressed.
- b. Secondly, this provision explicitly states that sourcing consistency between sellers or facilitators is not required so long as each seller is internally consistent in its method of sourcing sales. This creates a situation where taxing agencies cannot hold sellers accountable to a single definable standard and each seller can only be judged against that seller’s adherence to the relative sourcing method chosen by that seller. An undefined standard is the same as no standard at all.
- c. Thirdly, in many jurisdictions sourcing is a very important factor of sales tax collection because it is determinative of the rate that the transaction is subject to. Therefore, if a sale is not sourced correctly it could lead to more or less sales tax being collected than would otherwise be due if correctly sourced. Additionally, this has a very real impact on the budgets of counties, cities, and towns who derive revenue from the sales sourced to locations within their jurisdiction.